United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7168

To be argued by:
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RUTH FRIEDMAN, RAYMOND FRANKLIN, SIDNEY MOHR, WILLIAM C. LINGARD, and CHAIM PEINER, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services: THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services; and THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

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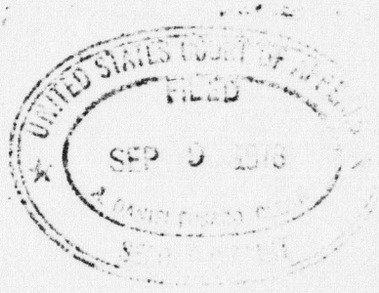

BRIEF FOR STATE APPELLEES

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UNITED STATES COURT OF APPEALS
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Questions Presented

1. Did the District Court correctly determine that plaintiffs had failed to state a substantial federal claim?

2. Did the District Court properly deny class action certification?

Regulation Construed

18 N.Y.C.R.R. § 360.5(e) provides in pertinent part:

> "If an applicant or recipient [of Medicaid] is receiving chronic care in a medical institution or intermediate care facility, all resources in excess of those exempt from consideration in accordance with paragraph (a) of subdivision 2 of section 366 of the Social Services Law and $28.50 per month for personal expenses shall be utilized to meet the cost of medical assistance for such applicant or recipient..."

Statement of the Case

This is an appeal from an order and judgment of the District Court for the Southern District of New York (Hon. Enzer B. Wyatt, D.J.) entered March 17, 1976 (R. 25-36).* Plaintiffs' motion for reconsideration (R.37)

* Numbers in parentheses preceded by "R" refer to pages of the abreviated appendix filed with leave of the Court by plaintiffs-appellants.

was summarily denied by the District Court on April 9, 1976.

Plaintiffs are persons being treated in institutions for chronic conditions who are receiving "Medicaid", but because of their incomes, are otherwise ineligible for Supplemental Security Income or other cash public assistance. They, and the class of persons they purport to represent are patients in hospitals or nursing homes so situated (R.2).

Suing under the Civil Rights Laws, 28 U.S.C. § 1343, 42 U.S.C. § 1983, plaintiffs sought declaratory and injunctive relief against inforcement of 18 NYCRR § 360.5(e) on the grounds that it denies to them due process and equal protection of the laws under the Fourteenth Amendment to the Federal Constitution and is otherwise in conflict with the pertinent provisions of the Social Security Act and Regulations. They also claim "federal question and amount" jurisdiction. Plaintiffs allege that they are required to "spend down" to all but $28.50 per month of their income whereas recipients of SSI receive the use of an additional $20.00 per month (R. 2-3). Plaintiffs also sought to prosecute their claims as a class action (R.3-4).

On the return date of plaintiffs' motion for a preliminary injunction the State Commissioner of Social Services and the State Department of Social Services interposed an answer (R.12) in which they alleged inter alia, that the complaint failed to allege a substantial federal question (R.18) and that the complaint failed to state a claim upon which relief can be granted (R.14).* Both the underlying merits of the case, as well as the request for the issuance of a preliminary injunction, were briefed and argued to the Court by plaintiffs and the State.**

* Among the other affirmative defenses, it was urged that the action should be dismissed as to the New York State Department of Social Services since it is not a "person" within the meaning of 42 USC § 1983, 28 USC § 1343. See Zuckerman v. Appellate Division, 421 F. 2d 625 (2d Cir. 1970); Erdmann v. Stevens, 458 F. 2d 1205, 1208 (2d Cir. 1972) and is clothed with sovereign immunity, U.S. Const. Amend. XI, Edelman v. Jordan, 415 U.S. 651, 663 (1974). Cf. Matherson v. Long Island State Park Commission, 425 F. 2d 566, 568 (2d Cir. 1971). However, this defense was not reached in view of the District Court's disposition of this case.

** The Corporation Counsel of the City of New York appeared on behalf of defendants Dumpson and New York City Department of Social Services but did not actively participate.

In accordance with the rule against unnecessary determination of constitutional issues, Hagans v. Lavine, 415 U.S. 520, 536, 538, 543-544 (1974); Peters v. Hobby, 349 U.S. 331, 338 (1955), the District Court first addressed itself to the issue of whether 18 NYCRR § 360.5(e) conflicted with federal law or regulation. Having found no such conflict, the District Court dismissed the action on the basis of its determination that the New York statutes and regulations did not accord different treatment to the "medically needy" as opposed to the "categorically needy" recipients of Medicaid who were in hospitals and nursing homes by requiring them to "spend down" to a lower level than the latter (R. 34-36). Class action treatment was denied on the ground that the proposed class of "Medicaid recipients having incomes of in excess of $45 per month" lacked legal meaning (R. 32-33). Plaintiffs' motion for reargument (R. 37) opposed by defendants (R. 44) was also denied.

POINT I

PLAINTIFFS HAVE FAILED TO DEMONSTRATE A CONFLICT BETWEEN FEDERAL LAW AND STATE REGULATION.

Plaintiffs concede that their interpretation of the law conflicts with that of the Department of Health, Education and Welfare (R. 23-24) whose views were properly accepted by thhe District Court (R. 35), Udall v. Tallman, 380 U.S. 1, 16 (1965). Similarly, they concede, the fact found by the District Court (R. 35), brief p. 11, f.n. that recipients of both Medicaid and S.S.I who are receiving institutional care for chronic conditions are normally prevented from retaining any more income than the patient in the adjoining bed who receives Medicaid only. Yet, they persist in their claim that they are being treated differently in violation of 42 U.S.C. § 1396(a)(17) and 45 CFR § 248.3(c). This is clearly not so.

What plaintiffs have done is to confuse the $20 per month income disregarded for purposes of determining eligibility, 42 U.S.C. § 1392a(b) with the requirement that a Medicaid recipient "spend down" to the level of cash

public assistance received by a chronic care patient on SSI. The latter are given $25 per month cash assistance, 42 U.S.C. § 1382(e)(1) and 20 C.F.R. § 416.231(a)(2), thus the "Medicaid only recipient may be required to "spend down" to the equivalent of aid furnished to the SSI recipient under the comparability standard, 42 U.S.C. § 1396a(a)(17) and 45 C.F.R. § 248.3(c).

The authorities offered by plaintiffs to support their claim are inapposite, Aitchison v. Berger, 404 F. Supp. 1137 (S.D.N.Y., 1975) aff'd #75-7673 (2d Cir., 1976) cert. filed #75-1447 and, Brown v. Beal, 404 F. Supp. 770 (E.D. Pa., 1975) both deal with situations where housing needs were figured differently or cash public assistance differed from Medicaid as opposed to other public assistance recipients or dealt with different State income or property exemptions, Dominquez v. Milliken, CCH Medicare & Medicaid ¶ 26, 633 (W.D. Mich., 1973) and Schaak v. Schmidt, 344 F. Supp. 99 (E.D. Wisc., 1971).

Plaintiffs' contention, br., p. 14, that SSI recipients are being charged an illegal fee by themselves being required to "spend down" the amount of income disregarded in

determining eligibility was never properly before the District Court nor is it properly before this Court, since none of the plaintiffs or their alleged class are SSI recipients and thus lack standing to raise the issue, Warth v. Seldin, 422 U.S. 490, 499 (1975); Flast v. Cohen, 392 U.S. 83, 100 (1968); Sierra Club v. Morton, 405 U.S. 727, 732 (1972). Moreover, this claim arises out of their own interpretation of the statute and regulations; one that is shared neither by the Federal Government, HEW Policy Information Memo No. 74-11 nor the State (47). No matter how imaginative their theory may be, plaintiffs fail to support it with any authority.

The same may be said for the claim, br., p. 19, et seq. that, chronic care Medicaid recipients are themselves entitled to retain an additional $20 of disregarded income. Their own, unsupported interpretation of the law is at variance with HEW's and admittedly so, br., p. 21, Udall v. Tallman, supra.

One cannot fault plaintiffs' counsel for wishing to obtain some additional pocket money for the aged and

infirm. However, this is a question of priorities that must be resolved by Congress and the respective State legislatures, cf. Dandridge v. Williams, 397 U.S. 471, 478 (1970).

POINT II

CLASS CERTIFICATION WAS PROPERLY DENIED.

The District Court having determined that plaintiffs' underlying claim lacked any merit, it follows that their proposed class of Medicaid recipients having income of more than $45 lacks legal significance. This determination by the District Court (R. 32-33) was clearly correct. Regardless of their alleged numbers, cf. Korn v. Franchard Corp., 456 F. 2d 1206, 1209 (2d Cir., 1972) or commonolity of claims, cf. Aitchison v. Berger, supra, class certification would not afford a "superior" means of litigating the issues, see Green v. Wolf Corp., 406 F. 2d 291, 301 (2d Cir., 1968) in the light of the District Court's dismissal.

CONCLUSION

THE ORDER AND JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
September 8, 1976

Respectfully submitted,

Louis J. Lefkowitz

LOUIS J. LEFKOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for appellees herein. On the 8th day of September, 1976, he served the annexed upon the following named person:

JOHN C. GRAY, JR., ESQ.
Attorney for Appellants
Brooklyn Legal Services Corp. B.
152 Court Street
Brooklyn, N. Y. 11201

Attorney in the within entitled appeal by depositing 3 true and correct copies thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

ROBERT S. HAMMER

Sworn to before me this
8th day of September, 1976

Assistant Attorney General
of the State of New York